NLRB v. KNUTH BROTHERS: THE BOUNDARIES OF UNPROTECTED "DISLOYALTY" WHEN A NON-STRIKING EMPLOYEE'S SECTION 7 CONCERTED ACTIVITY THREATENS EMPLOYEE-CUSTOMER RELATIONS

Knuth Brothers produces print work subcontracted to it by dealers who solicit the work from the ultimate customers. To ensure their position as middlemen, the dealers insist that Knuth not identify itself to the ultimate customer. In the spring of 1974, a Knuth employee, while engaged in concerted union activity,[1] negligently violated this confidence by contacting an ultimate customer. He was fired, and his union filed charges of unfair labor practices with the National Labor Relations Board (NLRB). The General Counsel issued a complaint charging that Knuth violated sections 8(a)(1)[2] and 8(a)(3)[3] of the National Labor Relations Act[4] on the ground that the employee's section 7[5] right to engage in concerted activity protected him from discharge. The Administrative Law Judge upheld the complaints,[6] and the NLRB affirmed[7] as to the section 8(a)(1) violation without reaching the section 8(a)(3) question.[8] The Seventh Circuit, however, refused to enforce the NLRB's order,[9] holding that an employee forfeits section 7 protection when in the course of concerted activity he negligently violates a trust between his employer and a customer. This result followed even though the employee involved did not intend to damage relations with the

---

[1] *See* text accompanying note 63 *infra*.

[2] 29 U.S.C. § 158(a)(1) (1970), making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]."

[3] 29 U.S.C. § 158(a)(3) (1970), making it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."

[4] 29 U.S.C. §§ 151-97 (1970 & Supp. V 1975).

[5] 29 U.S.C. § 157 (1970), providing in part: "Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

[6] Knuth Bros., 218 N.L.R.B. 869, 871-76 (1975) (reproducing opinion of Administrative Law Judge).

[7] *Id.* at 869 (NLRB opinion).

[8] *Id.* at 869 n.1.

[9] NLRB v. Knuth Bros., 537 F.2d 950 (7th Cir. 1976).

customer-dealer and the employer had failed to put him on notice that such a trust existed.[10] The court reasoned that the employee "never had any excuse whatever for meddling in his Employer's dealings with its customers,"[11] and therefore that he had been disloyal in failing to take care to protect a confidence that he never knew existed. In so holding, the court ignored the previously accepted *sine qua non* of a finding of a "disloyal" breach of confidence: that the employee be on notice that he is threatening a valuable interest of his employer.[12] The court was compelled to reach this curious result by the great weight it assigned to the employer's interest in insulating his customer relations from the effects of labor disputes involving non-striking employees.[13]

This Comment will examine the importance of *Knuth Brothers* as an exception to the general rule of section 7 protection for concerted activities. Particular attention will be given to the line of "disloyalty" cases, on which the Seventh Circuit's holding is based. Through this examination of the "disloyalty" doctrine as it existed prior to *Knuth Brothers*, the Comment will suggest that the case departs significantly from prior case law, and that this departure is neither desirable nor wise.

I. *KNUTH BROTHERS* AND THE SCOPE OF A NON-STRIKING EMPLOYEE'S PROTECTION IN DEALING WITH CUSTOMERS

Knuth Brothers is a wholesale printer of business forms. It has no sales force of its own and depends upon its dealers to generate demand for its operations.[14] The dealers frequently insist that ultimate customers not know that their order has been subcontracted, or to whom it has been subcontracted, for fear that customers might attempt to by-pass the middleman and avoid paying the dealer's mark up.[15] Knuth Brothers presented convincing evidence that it took precautions to guard its anonymity;[16] however, those precautions were found insufficient

---

[10] 218 N.L.R.B. at 876.

[11] 537 F.2d at 956 (quoting 218 N.L.R.B. at 871 (Member Kennedy, dissenting)).

[12] *See* text accompanying notes 73-81 *infra*.

[13] *See* text accompanying notes 45-48 *infra*.

[14] 537 F.2d at 951.

[15] *Id.*

[16] Knuth presented evidence attesting to the existence of an important trust between its dealers and itself. When necessary to clarify specifications of a job in progress, specifically designated individuals were authorized to make contact only with the dealer. 218 N.L.R.B. at 871. Although customer contacts were not explicitly forbidden, all newly hired employees were told by Knuth's vice-president that the company had no contact with ultimate consumers. 537 F.2d at 951-52. The existence of a trust was

to warn its employees of the confidential nature of that relationship.[17]

Phillip Popovitch, the discharged employee, was a pressman and member of the Milwaukee Printing Pressmen and Assistants Union No. 7;[18] this union had been certified as the pressmen's bargaining representative in July, 1973.[19] Their negotiations with Knuth, however, had not yielded an acceptable contract by March, 1974.[20] In order to improve their bargaining position, the pressmen decided to organize the firm's production employees.[21] Popovitch was very active in this organizational campaign. It came to his attention that the Schlitz Brewing Company, an end-user customer with whom Knuth had no direct business relationship, currently had a job in the plant.[22] Popovitch knew that Schlitz was a union employer and believed that it dealt only with other unionized firms. He thought it would be helpful in the organizational campaign if he could tell the production employees that Knuth was awarded the Schlitz business because the pressmen were unionized,[23] and that a fully unionized shop might attract more business from other unionized firms.[24] In order to verify this prospective campaign propaganda, Popovitch called an employee in Schlitz's purchasing department, identified himself, and asked whether Schlitz considered union status in awarding work contracts.[25] In an effort to determine Schlitz's policy, the Schlitz employee contacted the dealer.[26]

---

further supported by an employment contract clause common to many firms in the area, which provided that:

> The Union realizes delicate confidences often necessary between the management of a firm and its employees and agrees to hold any and all private matter acquired by its members in their employment as a sacred trust not to be imparted to others or discussed outside the shop in which they are employed.

218 N.L.R.B. at 871 n.2. Knuth, however, was not a party to that contract. 537 F.2d at 955. Knuth showed that when it shipped a completed job directly to a customer, it was always shipped in the name of the dealer. *Id.* at 951. Finally, Knuth showed that previously it had lost the business of a dealer account when it accidentally revealed to a customer that it was doing that dealer's work. *Id.* at 955.

[17] *See* 218 N.L.R.B. at 876.

[18] 537 F.2d at 952.

[19] 218 N.L.R.B. at 872.

[20] *Id.*

[21] *Id.*

[22] 537 F.2d at 952.

[23] 218 N.L.R.B. at 872.

[24] *Id.* The prospect of getting additional work was a matter of considerable concern for Knuth's employees since the majority of them were able to work only part time. *Id.* at 873 n.8.

[25] 537 F.2d at 952.

[26] *Id.* The Schlitz employee testified that Popovitch "was wondering why he had a

The dealer, Prismagraphics, one of Knuth's oldest and largest dealer accounts, was responsible for over $100,000 worth of Knuth's business.[27] As a result of the call, Prismagraphics accused Knuth of violating a trust and questioned whether their business relationship could continue.[28] Knuth discharged Popovitch. The union filed charges of unfair labor practices, and the General Counsel issued a complaint alleging violations of sections 8(a)(1) and 8(a)(3) of the Act.[29]

In a hearing before an Administrative Law Judge the General Counsel charged that Knuth used the incident as a pretext to rid itself of an active union organizer, and that the discharge, therefore, was motivated by the desire to discriminate against union activity in violation of section 8(a)(3). He further alleged that even if the reason given for the discharge was not merely a pretext for anti-union discrimination, Popovitch's call was nonetheless concerted activity, and, as such, was protected from employer interference.[30] Knuth alleged that Popovitch intended to cause a consumer boycott[31] and that he breached an important confidence.[32] It portrayed his action as "disloyalty" unprotected by section 7 and as constituting cause for discharge.

The Administrative Law Judge found that Popovitch's call to Schlitz was the sole reason for his discharge; Knuth was not motivated by intent to discriminate against union activity.[33] She

---

job in his plant, since they [Knuth] were not union and we were." *Id.* She responded that "it doesn't seem right that the work should go to a non-union shop." *Id.* The Administrative Law Judge credited Popovitch's testimony that he did not intend to jeopardize Knuth's Schlitz business, 218 N.L.R.B. at 875 n.16, and the Seventh Circuit accepted this finding. 537 F.2d at 953 n.4.

[27] 537 F.2d at 952.

[28] *Id.* at 953. A Prismagraphics salesman telephoned Popovitch and told him that he, the salesman, would have been in serious trouble but for the fortuitous circumstance that Schlitz was already aware that its work was "farmed out." *Id.* at 952. The evidence indicated, however, that Schlitz was not aware the work was subcontracted to an only partially unionized firm. *Id.* at 952-53 n.3. The evidence further indicated that Prismagraphics was "irate," 218 N.L.R.B. at 873, partly because Knuth could not control its employees. 537 F.2d at 955. The Seventh Circuit believed that the discharge was justified if only to assuage Prismagraphics' anger. *Id.* No actual business loss was required to substantiate the existence of a legitimate business interest. *Id.*

[29] 218 N.L.R.B. at 871.

[30] *Id.* at 874.

[31] 537 F.2d at 954-55.

[32] 218 N.L.R.B. at 874. Knuth also alleged that Popovitch violated three of its shop rules. The Administrative Law Judge, however, found that Knuth was unable to articulate in precisely what manner Popovitch's conduct was covered by the rules. *Id.*

[33] *Id.* at 874-75. The Administrative Law Judge wrote: "[T]here is no allegation that [Knuth] committed any other unfair labor practices, and no evidence of other unlawful conduct, which would support a finding of union animus, in these circum-

also found that Popovitch did not intend to cause a boycott or realize that his action might damage his employer's business.[34] Popovitch's failure to perceive the possible consequences of his act is explained by the Administrative Law Judge's holding that "the confidential nature of the particular information revealed by Popovitch's call to Schlitz [was] not established by [Knuth's] shop practices or the industry contracts, was never made known to employees generally or to Popovitch in particular, and was not a significant concern in [Knuth's] reason for the discharge."[35] In the absence of intent to damage the employer's business, or at least knowledge that such damage could result from his actions, she held that Popovitch's action could not be considered "disloyalty."[36] Despite Knuth's belief that Popovitch intended to cause a boycott,[37] the employee's action remained protected under the well established principle[38] that

> an employer's belief that his employee, in the course of union activity, engaged in misconduct outside the purview of Section 7, does not remove that protection where the employee did not in fact commit the suspected offense, and that a discharge for the suspected misconduct violates Section 8(a)(1) of the Act.[39]

As Popovitch had not in fact been disloyal, the discharge was held to violate sections 8(a)(1) and (3).[40] The NLRB affirmed the

---

stances deemed necessary to support a violation based on pretext." *Id.* at 874. *See* 537 F.2d at 954.

[34] 218 N.L.R.B. at 876. This comment uses the term "boycott" in referring to any employee-induced customer pressure on employers that could damage the employer's business. For a discussion of the permissible limits of such activity during a labor dispute, see text accompanying notes 82-98 *infra*. Neither Knuth Brothers nor the Seventh Circuit used the term "boycott" in its technical legal sense. *See* 537 F.2d at 954-55.

[35] 218 N.L.R.B. at 876. The Administrative Law Judge stressed the absence of any rule or policy against customer contacts which was "publicized to [the] employees." *Id.* at 874. Knuth's explanation to new employees that it had no contact with the end-users of its production did not sufficiently put them "on notice that some critical secrecy is involved in this respect." *Id.*

[36] *Id.* at 875-76.

[37] *See id.* at 875. Knuth testified:

> In our opinion, [he was] actually performing a boycott [by] asking somebody why they're buying business forms from a non-union shop . . . causing pressure on our dealer to send business to a union shop or trying to cause that pressure. And we felt . . . very strongly that if that was to happen . . . it could conceivably cost us many dollars in business . . . .

Id.

[38] *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

[39] 218 N.L.R.B. at 876.

[40] *Id.*

8(a)(1) violation without further analysis.[41] Member Kennedy dissented.[42]

A three-judge panel of the Seventh Circuit refused to enforce the NLRB's order because the findings of the Administrative Law Judge and the NLRB were "not supported by substantial evidence to the extent they indicate that Knuth was not concerned with the confidential nature of the business and to the extent they indicate that Knuth was only concerned with losing business through a secondary boycott."[43] The court did not expressly find that Popovitch had been put on notice of the confidential relationship between Knuth and Prismagraphics.[44] Rather, it accorded controlling importance to Knuth's interest in preserving good relations with its dealers.[45] It regarded an action in reckless disregard of those relations, whether or not intentional, as sufficient "misconduct" to justify discharge.[46]

---

[41] *Id.* at 869. The NLRB held that "[t]he Administrative Law Judge properly found that [Knuth's] discharge of Popovitch was not caused by any breach of confidentiality on the part of Popovitch, but rather by an unfounded fear on the part of Gary Knuth, Respondent's vice president, that Popovitch was attempting to initiate a secondary boycott . . . ." *Id.* The NLRB found it unnecessary to pass on the Administrative Law Judge's finding that Knuth's action in discharging Popovitch also violated section 8(a)(3) since, under the principle of NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964), the violation of section 8(a)(1) was clear. 218 N.L.R.B. at 869 n.1.

[42] 218 N.L.R.B. 869, 869 (Member Kennedy, dissenting) The Seventh Circuit adopted a position mearly identical to Member Kennedy's. *See* text accompanying note 48 *infra*.

[43] 537 F.2d at 955.

[44] *See* 537 F.2d at 951-52, 955. Although the court pointed out that new employees at Knuth were informed that the company had no contact with customers, it did not suggest that this placed the employees on notice that there was an important confidence to be protected. *Id.* at 951-52. The court rejected the Administrative Law Judge's finding that Knuth was unconcerned with the confidential nature of its business, but it did not overturn her finding, 218 N.L.R.B. at 876, regarding the failure of Knuth's business practices to establish the confidential nature sufficiently to alert the employees. *See* 537 F.2d at 955.

[45] 537 F.2d at 955. The court based its conclusion "on the failure of the ALJ and the Board to recognize the impact of [Prismagraphics'] anger and the disastrous effect the revelation could have had if Schlitz had not known the work was subcontracted." *Id.* The relevant business interest considered was the potential loss of business from Prismagraphics, not the potential loss of Schlitz's business.

The court cited Bell Fed. Sav. & Loan Ass'n, 214 N.L.R.B. 75 (1974), discussed in text accompanying notes 75-76 *infra*, to establish that no specific rule against revealing information is required for a finding of a breach of confidence. 537 F.2d at 955. The Administrative Law Judge's finding that the disclosure lacked significance because Knuth didn't remember if business from Prismagraphics and Schlitz fell off after the incident was dismissed as irrelevant since Prismagraphics' uncontroverted anger, which threatened Knuth with the loss of its substantial business, was sufficient to give Knuth a significant business interest. *Id.* Further, the union contract clause protecting confidences and Knuth's previous experience of losing a dealer's business as a result of a breach of confidence were mentioned as supporting the existence of a demonstrated and bona fide trust. *Id.*

[46] *See* 537 F.2d at 956.

Although Knuth could have effectively protected the trust simply by giving its employees explicit notice of its existence, the court believed discharge was appropriate in this case because of the particular harm threatened by this breach of confidence. An employee is regarded as "disloyal" in the highly sensitive context of customer relations when he negligently threatens harm to his employer's business by his union activity.[47] The court explained:

> Since Popovitch was a pressman, he never had any excuse whatever for meddling in his Employer's dealings with its customers, and an explicit prohibition would not be necessary. Popovitch's conduct was clearly far beyond the scope of duties for which he was paid, and thus he must be held to have been aware that he was meddling in his Employer's business affairs without authorization.[48]

Popovitch was found negligent in making his inquiry of Schlitz because he "need not have revealed any information which he learned in the course of his employment to have accomplished his objective."[49] Without revealing his employer, he could have told Schlitz that he was with the Pressman's Union involved in an organizational campaign and asked whether it considered union status in awarding work.[50] Alternatively, he could have attempted to verify his suspicion by contacting the dealer, whose name he knew. Neither approach would have either compromised the confidential employer-dealer relationship, or threatened the employer's business.

II. The Boundaries of Section 7 Protected Concerted Activities

A. *Statutory Scheme and the Test for a Section 8(a)(1) Violation*

An employee's right to engage in concerted activity under section 7 is protected by making employer interference with that

---

[47] *See id.* The court reasoned:

> In revealing the information, Popovitch acted in reckless disregard of his employer's business interests. Respondent had the right to expect its employees to use greater care in using information acquired in the course of their employment. Failure to use such care was an act of disloyalty to respondent. His avowed purpose of aiding the organizational campaign is insufficient to protect him from the effects of his misconduct and constituted cause for discharge.

Id.

[48] *Id.* (quoting 218 N.L.R.B. 869, 873 (Member Kennedy, dissenting)).

[49] *Id.*

[50] *Id.*

right an unfair labor practice under section 8(a)(1).[51] In addition to this general prohibition, four specific practices are outlawed, including the section 8(a)(3) ban on "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[52] The statutory scheme covering discharges is completed by a proviso to section 10(c) protecting an employer's right to discharge an employee for "cause."[53] By its terms section 8(a)(3) would seem not to cover Popovitch's discharge because an intent to discriminate is an element of that unfair labor practice. The exact nature of the intent required remains uncertain, however.[54] The Administrative Law Judge found a section 8(a)(3) violation despite her finding that Knuth was not motivated by anti-union animus.[55] The NLRB, however, found in unnecessary to consider the section 8(a)(3) issue since it found a clear violation of section 8(a)(1).[56] It has long been recognized that evidence of anti-union intent is not necessary to make out a violation of section 8(a)(1).[57] With

---

[51] Note 2 *supra*.

[52] 29 U.S.C. § 158(a)(3) (1970). Sections 8(a)(2)-(5) are particularizations of the 8(a)(1) proscription. They were intended to help the courts enforce the general declaration of rights in 8(a)(1) in certain areas where experience has shown a need for amplification and specification. *Labor Disputes Act, Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 2487 (1949) (statement of Sen. Wagner). They are not exclusive, however, and do not limit the scope of § 8(a)(1)'s omnibus guarantee of freedom. H.R. REP. No. 969, 74th Cong., 1st Sess. 15 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 2924 (1949). *See, e.g.*, Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 492-94 (1967).

[53] 29 U.S.C. § 160(c) (1970). Section 10(c) provides in pertinent part that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id. See* H.R. REP. No. 245, 80th Cong., 1st Sess., 42-43 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 333-34 (1948); H.R. REP. No. 510, 80th Cong., 1st Sess. 38-40, 54-55, 59 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 542-44, 558-59, 563 (1948); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 20-22 (1947); Note, *Strike Misconduct: An Illusory Bar to Reinstatement*, 72 YALE L.J. 182, 186-90 (1962).

[54] *See, e.g.*, Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Janofsky, *New Concepts in Interference and Discrimination under the NLRA: The Legacy of* American Ship Building *and* Great Dane Trailers, 70 COLUM. L. REV. 81 (1970); Oberer, *supra* note 52, at 500; 46 N.C.L. REV. 975, 980 (1968); 7 WAKE FOREST L. REV. 616, 621 (1971).

[55] 218 N.L.R.B. at 874, 876.

[56] 218 N.L.R.B. at 871 n.1.

[57] *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Getman,

intent eliminated from the analysis, the Seventh Circuit was faced with a conflict between the policies expressed by sections 10(c) and 8(a)(1).

Sections 10(c) and 8(a)(1) pose essentially the same question from opposite sides of the labor-management conflict: which concerted activities are "appropriate" for section 7 protection and which activities constitute "cause" for which an employer may discipline an employee without committing an unfair labor practice?[58] When Congress added the section 10(c) proviso in 1948,[59] it conveyed to the NLRB the message that "undesirable concerted activities are not to have any protection under the Act, and to the extent that the Board in the past has accorded protection to such activities, [this proviso] makes such protection no longer possible."[60]

Where section 7's protection of concerted activities ends and section 10(c)'s "cause" for discharge begins depends on the balance struck by the NLRB between the prejudice to the employee's section 7 rights and the employer's interest in preventing disruption of his operation.[61] Thus, when a court or the NLRB holds that an activity is "unprotected" or that an employee is "disloyal" it is stating a legal conclusion reflecting, usu-

---

Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. CHI. L. REV. 735, 756-61 (1965). *But see* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308-11 (1965); NLRB v. Brown, 380 U.S. 278, 285-86 (1965); NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 897-98 (5th Cir. 1962).

[58] *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 16-17 (1962); NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953); Note, *Strike Misconduct: An Illusory Bar to Reinstatement*, 72 YALE L.J. 182, 186 (1962). *See also* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1196 (1967).

[59] Labor Management Relations Act, 1947, Pub. L. No. 80-101, § 10(c), 61 Stat. 147 (1947) (codified at 29 U.S.C. § 160(c) (1970).

[60] H.R. REP. No. 510, 80th Cong., 1st Sess. 39 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 543 (1948).

[61] *See, e.g.* NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-29 (1963); NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957) (Buffalo Linen); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). *See also* Getman, *supra* note 58, at 1199, 1209; Oberer, *supra* note 52, at 503, 515; 46 N.C.L. REV. 975, 980 (1968). *But see* American Ship Building Co. v. NLRB, 380 U.S. 300, 317 (1965); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497-500 (1960). In these later cases the Supreme Court criticized the NLRB's balancing of the economic weapons available to labor and management in enforcing collective bargaining demands as inconsistent with the Act's policy favoring free collective bargaining. These cases are difficult to reconcile with the Court's balancing approach in *Erie Resistor*. They did not, however, involve discharges of individual employees for engaging in concerted activity. *Insurance Agents* involved a finding that the company refused to bargain in good faith, and *American Ship Building* involved a lockout. In both, the NLRB had explicitly attempted to adjust the relative bargaining power of unions and management.

ally *sub silentio*, the outcome of this balancing process. The term "disloyalty" is nothing more than a conclusory label with no independent explanatory value. In considering why Popovitch's conduct might be labeled "disloyal," it is necessary to examine other "unprotected" activities to isolate the crucial factors in the balancing process,[62] particularly in the areas of breach of confidence and employees' dealings with customers.

B. *A Brief Outline of the Protective Scope of Section 7*

The phrase "concerted activity" is a term of art that should not be read literally.[63] Many organizational or union related actions, which are clearly "concerted activity" in fact have been held not to be within the contemplated ambit of section 7 protection. Protection has not been given, for example, to employees who act illegally in the course of concerted activity. Section 7 does not extend to employees striking to force the commission of an unfair labor practice,[64] or to employees striking in violation of a mutiny statute,[65] or to employees striking to enforce a wage demand in violation of the Wage Stabilization Act.[66] Moreover, any conduct in the course of an otherwise lawful strike that violates criminal or tort laws subjects the individual employee to possible discharge.[67] Section 7 does not require an employer to tolerate behavior specifically condemned by other laws. In a similar line of cases, the courts have denied protection to conduct

---

[62] *See generally* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

[63] *Id.* at 319 n.2; Comment, *Constructive Concerted Activity and Individual Rights: The* Northern Metal-Interboro *Split*, 121 U. PA. L. REV. 152, 153-54 (1972).

[64] Thompson Prods., Inc., 72 N.L.R.B. 886 (1947), *vacating* 70 N.L.R.B. 13 (1946). Thompson's employees struck to force the recognition of a union after another union had been certified. Thompson's acquiesence would have violated section 8(a)(2).

[65] Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

[66] American News Co., 55 N.L.R.B. 1302 (1944).

[67] In the leading strike misconduct case, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), the Court held that a sit-down strike and seizure of a factory building was unlawful conduct unprotected by § 7. *See* Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (mass picketing blocking access is unprotected); Hotel Employees' Local 122 v. Wisconsin Employment Relations Bd., 315 U.S. 437 (1942) (violent picketing unprotected). *But see* Republic Steel Corp. v. NLRB, 107 F.2d 472, 479-80 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7 (1940) (in the context of heated dispute relatively minor misconduct will not bar reinstatement). Another line of cases holds that reinstatement may be appropriate when the employee's misconduct has been provoked by employer unfair labor practices. *See* NLRB v. Thayer Co., 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced in part, remanded in part sub nom.* Kohler Co. v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), on remand 148 N.L.R.B. 1434 (1964), *enforced*, 345 F.2d 748 (D.C. Cir.), *cert. denied*, 382 U.S. 836 (1965).

that undermines collective bargaining.[68] This position is justified by the inconsistency of protecting activity that undermines the fundamental policy of the Act.[69] Both lines of cases reflect specific policy choices basic to any determination of the proper scope of the national labor law and are not the result of any desire to protect the employer himself from concerted activity.

The desire to allow some special protection for employers in certain unusual situations is important in a separate line of cases, the so-called "disloyalty" cases. In these cases, "disloyalty" signifies a legal conclusion that management interests are of such importance that they outweigh any concomitant frustration of union rights. In this sense the disloyalty cases are similar to the related line of partial strike cases.[70] Although the latter cases are often justified on the grounds that partial strikes are immoral or distasteful to the community's idea of an employee's duty to his employer,[71] a more likely rationale for denying section 7 protection is that such a weapon would destroy the balance of power between management and union. The partial strike could totally cripple an employer's business at little or no expense to the union.[72] The employer's right to demand the loyalty of his

---

[68] *See* Emporium Capewell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975); NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939) (strikes in breach of a collective bargaining contract); Plasti-Line, Inc. v. NLRB, 278 F.2d 482, (6th Cir. 1960) (minority strike by employees dissatisfied with the union's settlement of their seniority rights and transfer pay); NLRB v. Ford Radio & Mica Corp., 258 F.2d 457 (2d Cir. 1958) (walkout and refusal to state grievances); Harnischfeger Corp. v. NLRB, 207 F.2d 575 (7th Cir. 1953) (wildcat work stoppage); NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944) (minority strike by employees dissatisfied with the progress of negotiations). *But cf.* NLRB v. R.C. Can Co., 328 F.2d 974 (5th Cir. 1964) (minority strike intended to support union's position protected if not in violation of no-strike pledge).

[69] *See* Cox, *supra* note 62, at 328-33.

[70] The Supreme Court's decision in UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (unannounced work stoppages), accepted the view that employees are unprotected by section 7 when, without going on strike, they accept their wages while disrupting the operation of their employer's business. *See* NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946) (refusal to handle correspondence of a struck plant); United Biscuit Co. v. NLRB, 128 F.2d 771 (7th Cir. 1942) (slowdowns); C.G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939) (refusal to work overtime). *See also* Boeing Airplane Co. v. NLRB, 238 F.2d 188 (9th Cir. 1956) (recruitment by employee of other highly-trained employees to work for employer's competitors "disloyal" like slow-down or sit-down strike).

[71] *See* Cox, *supra* note 62, at 338; Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 379-80 (1969).

[72] Schatzki, *supra* note 71, at 382. Schatzki also observed that "partial strikes are no more distasteful or 'immoral' than strikes, picketing, and other protected devices used by unions and employees to defeat the employer in economic battle. All are a form of disloyalty; all are an attempt to interfere with the boss's business." *Id.* at 379-80.

Another class of "disloyalty" cases expressing a strong respect for employer interest

workers while they are receiving his pay is too central to the balance of economic power for the courts to allow section 7 protection.

This same calculus of rights can be seen in the disloyalty cases. These break down into two basic groups: those dealing with breach of employer confidence and those dealing with employee interference in customer relations. In these cases, whether they justified their decisions because of the "immorality" of disloyalty or because of a preceived threat to the economic balance of power, courts have usually allowed the employer's interests to outweigh the employee's section 7 protection. Elements of both groups of disloyalty cases can be found in *Knuth Brothers*, but neither line would seem to justify the Seventh Circuit's result.

1. Breach of Employer Confidence

The basic rule of the breach of confidence cases is that "employees are entitled to use . . . information and knowledge which comes to their attention in the normal course of work activity . . . but aren't entitled to their Employer's private and confidential records."[73] The issue in these cases usually focuses on whether the information divulged is in fact confidential and whether the employee was put on notice of its confidential nature.[74] In *Bell Federal Savings and Loan Association*[75] a switchboard operator who told her union how many telephone calls her employer received from his lawyer in the course of one day argued that she was protected from dismissal because her employer never promulgated a rule designating such information as confidential. The NLRB held that the absence of a prior rule is not controlling

---

involves strikes to influence the choice of supervisors. Concerted activity designed to interfere with such a "prerogative of management" is unprotected. *See, e.g.*, Cleaver-Brooks Mfg. Corp. v. NLRB, 264 F.2d 637 (7th Cir.), *cert. denied*, 361 U.S. 817 (1959); NLRB v. Reynolds Int'l Pen Co., 162 F.2d 680 (7th Cir. 1947). *See* Getman, *supra* note 45, at 1211-18.

[73] Ridgley Mfg. Co., 207 N.L.R.B. 193, 196-97 (1973), *enforced*, 510 F.2d 185 (D.C. Cir. 1975). *See* Anserphone, Inc., 184 N.L.R.B. 305 (1970); Steele Apparel Co., 172 N.L.R.B. 903, 912-13 (1968), *enforced*, 437 F.2d 933 (8th Cir. 1971); Murray-Ohio Mfg. Co., 148 N.L.R.B. 1541 (1964), *enforced*, 358 F.2d 948 (6th Cir. 1966).

[74] *See* Farlow Rubber Supply, Inc., 193 N.L.R.B. 570, 573 (1971) (employee urged a clerk to disclose information that would have been so valuable to a competitor that it was kept in a fireproof vault); Vitronic, Inc., 183 N.L.R.B. 1067, 1078 (1970) (confidentiality of material evidenced by employee's gathering it furtively and denying it when confronted by employer). *See also* News-Texan, Inc., 174 N.L.R.B. 1035, 1038 (1969); Cello-Foil Products, Inc., 171 N.L.R.B. 1189, 1193 (1968).

[75] 214 N.L.R.B. 75 (1974).

when the information is of an obviously confidential nature.[76] In *Southern and Western Lumber Co.*,[77] the NLRB elaborated on the indicia of confidentiality necessary for a breach amounting to "disloyalty." Notecards containing the names and addresses of employees and kept in a supervisor's office were held not to have sufficient appearance of confidentiality because no announced policy declared them to be confidential, and the nature of the information and the place and manner in which it was kept did not give the employees any "reason to believe that any such policy of confidentiality existed."[78]

In view of this standard and the Administrative Law Judge's finding in *Knuth Brothers* that "the confidential nature of the particular information revealed . . . [was] not established by [Knuth's] shop practices . . . [and] was never made known to employees generally or to Popovitch in particular,"[79] it is difficult to justify the Seventh Circuit's finding of disloyalty. A good, perhaps even convincing, case can be made that the Administrative Law Judge's findings of fact were, in fact, wrong.[80] Knuth argued persuasively that the indicia of confidentiality were more than sufficient to put Popovitch on notice of the relationship, and that he knew or should have known of its importance.[81] But such a holding would have required the Seventh Circuit to overrule the finder of fact at least as to the extent of notice, or as to Popovitch's intent, and this they were unwilling to do. This being the case, it is truly remarkable that Popovitch be found negligent in violating a confidence that he did not know, nor could be expected to know, existed. If the

---

[76] *Id.* at 77-78. In its *Knuth Brothers* brief, the NLRB distinguished *Bell Federal* on the ground that "[n]othing so obviously confidential was involved here." Brief for Petitioner at 10 n.6.

[77] 212 N.L.R.B. 668 (1974).

[78] *Id.* at 669.

[79] 218 N.L.R.B. at 876. *See* note 35 *supra*. The concern the NLRB and the courts have shown for the employee's intent in gathering and disclosing information can be seen in the duty they have imposed on the employee to represent accurately non-confidential information to fellow employees and the employer. An employee loses the protection of section 7 if the information he conveys is deliberately or maliciously false; however, such intent will not be lightly inferred from a misstatement. NLRB v. Illinois Tool Works, 153 F.2d 811, 815-16 (7th Cir. 1946) (no improper motive where the misleading statements are prompted by excitement); Walls Mfg. Co., 137 N.L.R.B. 1317, 1319 (1962); Paul Cusano, 92 N.L.R.B. 1272, 1284, *enforced sub nom.* Cusano v. NLRB, 190 F.2d 898, 902 (3d Cir. 1951) (dictum); Atlantic Towing Co., 75 N.L.R.B. 1169, 1173 (1948). *Compare* Whitin Machine Works, 100 N.L.R.B. 279, 291 n.22 (1952) (dictum) *with* Westinghouse Elec. Corp., 77 N.L.R.B. 1058, 1060-61 (1948), *enforcement denied on other grounds*, 179 F.2d 507 (6th Cir. 1949).

[80] *See* note 16 *supra*.

[81] *See* Brief for Respondent, at 11-22.

court's position can not be justified by the breach of confidentiality cases, it might be better understood through an examination of the second line of disloyalty cases.

2. Interference with Customer Relations

It may have been that the obvious harm done by Popovitch to customer relations forced the court's negative reaction. Traditionally, the degree to which an employer's customer relations are insulated from his employee's concerted activities depends in part on whether the employees are on strike. Striking employees may appeal to customer sympathy and urge them to boycott the employer's product for the duration of the strike.[82] They may not, however, appeal to the customer's business sense by urging a boycott based on the assertion that the product's quality is poor. In the leading disparagement case, *NLRB v. Local 1229, IBEW (Jefferson Standard)*,[83] the Supreme Court held that the distribution by non-striking employees of a handbill disparaging the employer's product without making reference to the underlying labor dispute was unprotected "disloyalty" and constituted "cause" for discharge within the meaning of section 10(c). The NLRB later extended this rule to reach disparaging attacks made by strikers alleging that product quality suffered as a result of the substitution of inexperienced replacements for the strikers.[84] Only recently has the NLRB allowed an exception where the employer's product is nothing more than a service performed by the strikers.[85] In those cases strikers may publicize the labor

---

[82] *See, e.g.*, NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964).

[83] 346 U.S. 464 (1953).

[84] Patterson-Sargent Co., 115 N.L.R.B. 1627 (1956) (3 to 2 split). In *Patterson*, striking employees of a paint company handed out handbills warning customers that because of the strike the paint would not be made by the well trained employees who made the paint the customers always bought. The NLRB held that such an attack is "disloyal" even if true. *Id.* at 1629. *Accord* Coca Cola Bottling Works, Inc., 186 N.L.R.B. 1050 (1970), *enforced*, 466 F.2d 380 (D.C. Cir. 1972). *See* M Restaurants, Inc., 223 N.L.R.B. 100 (1975) (restaurant patrons told food was unfit to eat). *But cf.* Black Angus, Inc., 213 N.L.R.B. 425, 433 (1974) (disparaging remarks made only a few impulsive times during five-week unfair labor practice strike).

[85] Hennepin Broadcasting Assocs., 225 N.L.R.B. 66 (1976). The NLRB held that "where the ultimate product provided by the primary employer . . . is a service performed by the strikers, it is difficult for a striker to publicize his strike activity to purchasers of that service without somehow suggesting that the service was better performed by him than by his replacement." *Id.* (slip op. at 36). *See* Frontier Guard Patrol, Inc., 161 N.L.R.B. 155 (1966), *enforced*, 399 F.2d 716 (10 Cir. 1968) (letter from strikers to customers stating that they did not see how their employer could "presently be rendering the service you need" held not sufficiently disparaging). *Cf.* Community Hospital of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607 (4th Cir. 1976), *enforcing* 220 N.L.R.B. 217 (1975) (non-striker's activity disparaging quality of hospital's services protected).

dispute by suggesting that the strikers performed the services better than their replacements. Given the difficulty in distinguishing an employee's direct work with a customer from his work on the production of an item for sale to customers, this evolution may suggest that the NLRB is modifying its position on disparaging attacks explicitly related to a strike. Where the disparaging attack is not explicitly tied to a current strike, the NLRB can correctly conclude that the employer's interest in preventing peraanent damage to his product's reputation justifies the employee's discharge since customers may continue the boycott after the dispute is resolved. The threat to the employer's interest is mitigated, however, when the attack is carefully tied to a current dispute. In that case, as in appeals for customer sympathy, the employees are only trying to make the employer feel the full impact of the strike. If product quality suffers due to the employer's use of untrained replacements, the employees should be protected in making the employer feel the full cost of that disruption. A more restrictive application of the disparagment rule is overly protective of the employer's interest in insulating his customer relations at the expense of an employee's legitimate strike weapon.

Not surprisingly, the "disloyalty" standard applied in the customer relations area to non-striking employees is stricter than that applied to strikers. The Seventh Circuit in *Hoover Co. v. NLRB*[86] held that non-striking employees are not protected in urging customers to support them in a labor dispute by boycotting the employer's product. The Supreme Court in *Jefferson Standard* relied on the *Hoover* assertion that "an employee can not collect wages for his employment and, at the same time, engage in activities to injure or destroy his employer's business"[87] to support its holding.[88] Popovitch's "disloyalty" was grounded in this same sweeping doctrine.[89] As in the case of partial strikes, this holding cannot be adequately explained by the immorality of "biting the hand that feeds you." Rather, the holding implies a judgment that such a weapon is too destructive of employer interests with no cost to employees.

What is most striking about all of the cases on interference with customer relations is that they require an intent to harm. Whereas the breach of confidence cases imposed a negligence

[86] 191 F.2d 380 (6th Cir. 1951).

[87] 346 U.S. at 476 n.12 (quoting Hoover Co. v. NLRB, 191 F.2d 380, 389 (7th Cir. 1951)).

[88] For a discussion of *Jefferson Standard*, see text accompanying note 83 *supra*.

[89] *See* 537 F.2d at 953-54.

standard based on the indicia of confidentiality, the second line of cases by definition turns on intent. An employee can not disparage his employer's product or business without intending to do so. Nor can an employee organize a boycott against his employer without intending to harm him. A striker may only rarely do the former, but may do the latter. A non-striker, for the most part, can do neither.[90] But this distinction is between two groups of employees, both of whom intend to harm their employers' business. Once again, it might be reasonable to suggest that Popovitch did intend to organize a boycott,[91] but the contrary finding was made by the Administrative Law Judge, and neither the NLRB nor the Seventh Circuit rejected this finding. If this finding is allowed to stand, the Seventh Circuit's decision seems unsupportable by prior case law.

Moreover, it might be added that even a finding of an intent to boycott would not be dispositive of the case. An employer's interest in preventing customer interference by non-striking employees is not absolute. In *Edir, Inc.*,[92] the NLRB held that a non-striking employee was protected in picketing his employer's place of business on his own time in the context of an organizational campaign. Refusing to accord determinative weight to prejudice to the employer, the NLRB distinguished *Jefferson Standard* on the basis of the lack of disparagement and the direct tie to a current labor dispute in the *Edir* situation where a traditional union weapon, the picket line, was employed.[93]

Protection was also extended to the employee in *Knuth Brother*'s companion case before the NLRB, *Circle Bindery Inc.*[94] In *Circle Bindery* an active union member, who was employed in a non-union bindery, noticed that the bindery was doing work under the union label for a unionized printer which was bound by a collective bargaining agreement to subcontract work bearing the union label only to unionized binderies.[95] The union member caused his non-union employer to lose the job and was fired for "disloyalty." The NLRB held that this intentional injury to customer relations by a non-striking employee was protected be-

---

[90] The ban on non-striker "disloyalty" is not total. *See* text accompanying notes 92-98 *infra*.

[91] *See* note 16 *supra*.

[92] 159 N.L.R.B. 686 (1966).

[93] *Id.* at 694-95.

[94] 218 N.L.R.B. 861 (1975), *enforced sub nom.* NLRB v. Circle Bindery, Inc., 536 F.2d 447 (1st Cir. 1976).

[95] NLRB v. Circle Bindery, Inc., 536 F.2d 447, 449 & n.5 (1st Cir. 1976).

cause the employee was merely enforcing the union label. The NLRB argued that the union's section 7 interest in "protect[ing] . . . a vital union asset, the union label"[96] outweighed the employer's "loss of business."[97] The First Circuit enforced the NLRB's order in an opinion which emphasized the court's belief that it should defer to the NLRB's balancing of employer and employee interests.[98]

Given these cases extending section 7 protection to non-striking employees who intended to harm the employer's customer relations, the Seventh Circuit's refusal to protect an employee engaged in concerted activities who never intended any harm to these relations is, at best, surprising.

III. Conclusion

Unfortunately, this departure from existing case law is not only novel, but unwelcome. When an employee intentionally violates a legitimate employer policy, the employer may fire him in order to maintain discipline in the plant. On the other hand, an unintentional breach of confidence poses no such threat to plant discipline. The employer's interest can be protected simply by making it known to the employees. There is no reason to deny section 7 protection to a class of concerted activity under the guise of protecting an employer interest that is not really threatened.

The court found Popovitch's conduct to be unprotected "disloyalty" in the absence of intent by introducing the factor that "he never had any excuse whatever for meddling in his Employer's dealings with its customers."[99] While dealing with customers in the course of concerted activity, the employee is responsible for unintentionally, but negligently, risking damage to his employer's relations with those customers. It is difficult, however, to fault Popovitch for failing to use due care in preserving a trust he had no reason to believe existed. The Seventh Circuit's emphasis on protecting the employer's customer interests was misplaced since Popovitch never purposely threatened those interests. In all earlier cases the employees had acted deliberately; the only means available to the employer to effectively protect his customer interests was the threat of discharge.

---

[96] 218 N.L.R.B. at 862.

[97] *Id.*

[98] 536 F.2d at 452-53.

[99] 537 F.2d at 956 (quoting 218 N.L.R.B. 869, 871 (Member Kennedy, dissenting)).

Given these incongruities, one is tempted to speculate that the Seventh Circuit wished to reject the Administrative Law Judge's intent findings. Such a result might raise serious questions about the weight to be accorded the findings of both the Administrative Law Judge and the NLRB, but it would be far preferable to a decision which needlessly sacrifices employees' section 7 rights in cases in which the employer could adequately have protected his interest by merely informing his employees of the confidence's existence and importance.